Property is not (just) private

Maximilian Steinbeis 2021-09-17T21:54:25

Property is guaranteed. That's what the German Constitution says, and from a common liberal perspective, freedom of property is a pretty straightforward thing: Here I am, my own proper body, my own hands' work and its fruits, what belongs to me, what is mine. There is the state, which would possibly take what is mine and subject it to its own purposes, if it were allowed to do so. But it is not. That is my fundamental right.

The beauty of this fundamental right is that it gets ever more peculiar the more you look at it.

In the case of other fundamental rights, freedom of speech, for example, or freedom of belief, what I am free to do is not a legal question. I don't have to consult the law to know what to speak or believe – on the contrary, that is prior to the law, is given to it, by me, and that is the whole point of my freedom. With property it is different. What belongs to me and what I can do with it is very much a legal question, necessarily so. Without the law, my property is nothing. The *Grundgesetz* is fully aware of that: „Content and limits" of my property, according to Art. 14 para. 1 p. 2, are determined by the legislator. Of course, he can and will subject what is mine to all sorts of policy purposes, as long as the burden imposed on me is not disproportionate and no breach of trust is committed. Provided this, the German legislator is entitled to immure my property with regulations and prohibitions up to the point of uselessness without owing me a cent of compensation.

What he cannot do, however, in any case not without adequate compensation, is to remove me from the position of owner and to put himself or someone else in my place just like that. This is what, in the eyes of some, is imminent in the city of Berlin: next week on Sunday, in parallel with the federal, state and local elections, a referendum will be held under the heading „Expropriate *Deutsche Wohnen & Co.*" demanding that the state of Berlin turn the private ownership of some 240,000 apartments, held by wildly unpopular real estate behemoths like *Deutsche Wohnen, Vonovia* and others, into common ownership of tenants, employees and inhabitants of Berlin in general – and for compensation „well below market value." According to the polls, it is not unlikely in our notoriously unruly capital that this proposal will surpass the required quota.

Would that be legal? Would Berlin, under its state constitution, the *Grundgesetz* and international law, be entitled to pull off such a thing? What options would the parties involved have? What would the consequences be? These are the questions we explore in the pilot episode of our newly launched **VerfassungsPod** podcast. We put a tremendous lot of work into it, talked to a wide range of experts, dug deeply into the intricacies of compensation and real-estate valuation practice, and enjoyed every minute of it, because in terms of constitutional law, the whole process is really quite exceedingly fascinating. The result is that we have enough material to produce

not just one but a whole series of (shorter) episodes, so you don't have to consume it all in one helping but can acquaint yourself with this complex matter one chapter at a time. At the moment, we are still in the producing and editing phase, hurrying to get it done and out in time before the vote is due, so you will be able to profit from our efforts and make an informed decision about whether to vote Yes or No or, if you can't vote, like or dislike the outcome.

Beyond the question of whether or not these 240,000 apartments will actually ultimately be socialized, which is all but certain even if the referendum is successful, perhaps the most important effect of this vote seems to me to be this: that it makes us form an opinion, about private property in general and that of *Deutsche Wohnen* and its ilk in particular. Their property is not (just) private, it is also and always political. It is not protected and shielded against politics. We can make it our business, quite literally. And it's the *Grundgesetz* which keeps that possible, in one of the least familiar and most fascinating norms within its catalogue of fundamental rights, which is article 15.

Ghent University, the Human Rights Center, Programme for Studies on Human Rights in Context invites applications for a workshop 'CAPTURED BY THE PAST: MONUMENTS. CONFLICTS. LAW' to be held on 21 January, 2022.

*The abstracts should be sent by **30 September, 2021**. The workshop is a part of MSC-IF research project 'To Destroy or to Preserve? Monuments, Law and Democracy in Europe' (MELoDYE).*

Call for papers here.

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The constitutional basis for the „Expropriate *Deutsche Wohnen* & Co." referendum is, contrary to what the name suggests, not the expropriation provision in Article 14 (3) of the Basic Law, but the following Article 15, which authorizes the state to transfer land, natural resources and means of production into common ownership or other forms of common economy. For 70 years this article had played no role whatsoever. It was encapsulated and isolated and mostly ignored by liberal legal doctrine and practice, like a foreign particle within the body of constitutional law. During the Cold War era, in the overpowering field of tension between Western market and Eastern state economy, there was hardly any room for it, and when this conflict was supposedly decided in favor of the West, even less. Now – and this is what, beyond the fate of *Deutsche Wohnen* et al., is up for a vote on Sunday – that could change.

Art. 15 was there, all those years. In its seclusion, it has survived the decades, preserved and untouched and peculiarly history-less: no cases, no judgments, hardly any academic, economic and political interest. Most of what little theory there is on it was already there in the early 1950s. From the beginning, two camps were facing each other: The liberal mainstream, one one hand, saw in Article 15 only a special case of expropriation under Article 14 (3) GG; the socialist minority, on the other, interpreted it as an entirely separate matter and fundamentally different from expropriation.

Even today, almost everything depends on this distinction: If one sees socialization merely as a special case of expropriation, then it must, of course, be proportional to the political purposes it is supposed to serve. In that case, it would be unconstitutional, for example, if rent regulation could achieve the same end in a much less intrusive way. Then things would be reasonably clear for compensation as well: the owner must of course be compensated for the value of his lost property, perhaps with certain deductions which have to be specially justified. A pretty straightforward thing, really.

If, on the other hand, one allows for the idea that the conversion of private into common property is not about diminishing any presupposed natural fundamental right, but rather about the transformation of the economic order in which property is attributed in the first place, then things look completely different. The purpose to which the measure would have to be proportional then follows from the wording of Art. 15 itself: „for the purpose of socialization" („*zum Zwecke der*

Vergesellschaftung„). That it is proportionate is then no longer a question of its suitability, necessity, and appropriateness for achieving a particular policy goal, but a decision of the *Grundgesetz* itself. And what is appropriate as compensation in this case is a largely open and thus malleable question.

More on this in our podcast. Such an exciting topic, so many fascinating aspects. I do hope we can maintain this standard in future episodes.

Which also depends on you: Our hope is to gather around this podcast a community of listeners who contribute 5 Euros per month on the crowdfunding platform Steady, so that we can afford the considerable effort it costs us in the long term. We also want to actively involve the contributors and discuss with them how we should approach the respective topic and which questions and aspects they are particularly interested in. If you want to join, by all means do! We look forward to talking with you!

The week on Verfassungsblog

Poland, it now seems, is finally running into trouble with the EU Commission after all for subjugating its independent judiciary, and especially for the brazenness with which the government ignores the orders of the European Court of Justice in this regard. The Commission has apparently asked the Court to impose a fine of up to 1 million euros for each day that this state of affairs continues. That sounds like a lot of money, but is it? In fact, in the view of THU NGUYEN, the process shows how little such proceedings can achieve, especially compared to the leverage the EU would have with the Covid-19 recovery fund.

Meanwhile, the gagging of independent judges who dare to cross the PiS government continues at an unabated pace. MARIA EJCHARD-DUBOIS, SYLWIA GREGORCZYK ABRAM, MICHA# WAWRYKIEWICZ and PAULINA KIESZKOWSKA-KNAPIK describe the latest developments.

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Dienstag, 21. September 2021, 19:00 Uhr, via Zoom.

*Auf ein Eingangsstatement unseres Gastreferenten Carlo Masala werden die Panelist*innen mit kurzen Repliken antworten. Anschließend öffnen wir das Gespräch für Fragen aller angemeldeten Teilnehmer*innen, um die Runde nach etwa 90 Minuten zu beschließen.*

Hier können Sie sich registrieren und erhalten nach erfolgter Anmeldung eine automatisierte E-Mail mit Zugangsdaten für die Veranstaltung. Rückfragen beantworten wir gerne unter berlin@mpil.de

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JOACHIM WIELAND's brief opinion piece on the affair surrounding the Osnabrück public prosecutor's **search of the Federal Ministry of Finance and the Federal Ministry of Justice** has caused quite a stir. To have two SPD-led ministries searched shortly before the Bundestag elections? Wieland considers this remarkable, to say the least, and the search illegal. We expect another analysis by KLAUS FERDINAND GÄRDITZ on the same topic tomorrow.

Shortly before the *Bundestag* elections, the Federal Election Commissioner and **polling institutes** are arguing over the question of whether absentee voters who have already cast their ballots should be excluded from the polls. This is because it is forbidden to publish statements about votes already cast before the polling stations close. HENRIK EIBENSTEIN is looking for ways out of the dilemma.

In Saxony, the Chemnitz Administrative Court can see no reason for an injunction to prohibit a Nazi party from hanging posters calling to „**Hang the Greens**„. The opinion of the public prosecutors of Zwickau that this is unobjectionable under criminal law have been examined by LEONIE STEINL and JAKOB SCHEMMEL shortly before. In their opinion, the case shows how little law enforcement agencies are still up to the task to grant protection against hate crime.

In the **United Kingdom**, the Tory government has tabled an Elections Bill which includes tightening the rules on voter IDs. For JACOB EISLER, this is a barely concealed attempt to subordinate electoral law to the political interests of the ruling party.

In **Ukraine**, the Constitutional Court is tumbling from one crisis to the next. While both Constitution and Court are celebrating their 25th anniversaries these days, it is entirely unclear who is currently the head of the Court. SERHII LASHYN finds much to criticize in the court's actions, but does not absolve the President of all blame either.

In **Slovakia**, the Constitutional Court in July declared unconstitutional a referendum to force snap elections. SIMON DRUGDA analyzes the decision and what it says about the limits of direct democracy.

In **Brazil**, President Bolsonaro, in the midst of coup rumours, has ordered an amendment to Brazil's Internet Bill of Rights regarding social media's duty to combat disinformation. ULISSES LEVY SILVERIO DOS REIS and RAISSA PAULA MARTINS report on what this is all about.

We have started experimenting with a new format this week: long **review essays** on new books about topical constitutional law and policy issues. BOGDAN IANCU has taken on four recent volumes that revolve around the current liberal hangover in and about and with respect to Europe – Günter Frankenberg's „*Authoritarianism: Constitutional Perspectives*," Ivan Krastev and Stephen Holmes' „*A Light that Failed: A Reckoning*„, Cristina Parau's „*Transnational Networking and Elite Self-Empowerment: The Making of the Judiciary in Contemporary Europe and Beyond*„, and Michael Wilkinson's just-published work „A*uthoritarian Liberalism and the Transformation of Modern Europe*„.

On Monday, we will launch a new online symposium, directed once again by the fantastic JOELLE GROGAN, in cooperation with the Max Planck Institute for International and Comparative Public Law in Heidelberg, Middlesex University London, and the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School. The topic will be „**International Pandemic Lawmaking**„. Harvard's Bill of Health Blog will publish the more health policy-

oriented papers, and we will publish the more constitutional law-oriented ones, always alternating. And three webinars are planned, the first of which will feature GIAN LUCA BURCI, SAKIKO FUKUDA-PARR, and AEYAL GROSS on Wednesday, September 22 at 4:00 pm GMT. To register, click here.

So much for this week. All the best to you, stay safe and healthy, support us on Steady and/or Paypal, and see you next week!

Max Steinbeis
